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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ISRAEL GAMERO, et al.,

4 Plaintiffs,

5 v.

15 Civ. 2697 (KPF)

6 KOODO SUSHI CORP., et al.,

7 Defendants.

Conference

8 -----x

New York, N.Y.
October 4, 2016
4:18 p.m.

9
10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13 APPEARANCES

14 MICHAEL FAILLACE & ASSOCIATES, P.C.

15 Attorneys for Plaintiffs

16 BY: SHAWN R. CLARK, ESQ.

17 LATHAM & WATKINS LLP

Attorneys for Defendants

18 BY: SERRIN A. TURNER, ESQ.

THOMAS J. GIBLIN, ESQ.

ERIC L. TAFFET, ESQ.

19 M. THEODORE TAKOUGANG, ESQ.

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(Case called)

MR. CLARK: Shawn Clark, Michael Faillace & Associates
for the plaintiffs.

Before we begin, I just want to apologize to you and
to defense counsel for my tardiness today. My apologies.

THE COURT: All right. You're here now. First day of
trial you're going to be on time, right?

MR. CLARK: Most certainly, your Honor.

THE COURT: Okay. Or even early.

Okay. And at the back table, go ahead.

MR. GIBLIN: Thomas Giblin, Latham & Watkins, for the
defendants, and Michelle Koo is seated next to me.

MR. TAFFET: Eric Taffet for defendants.

MR. TAKOUGANG: Theodore Takougang for the defendants.

MR. TURNER: And Serrin Turner for the defendants as
well. Hi, your Honor.

THE COURT: Hello. And Mr. Owens is not joining us
today, sir?

MR. TURNER: No. I'm trying to fill his shoes.

THE COURT: I'm not going to comment on that. That is
fine. Thank you, all.

Ms. Koo, I see you as well. Good afternoon.

MS. KOO: Yes, hello.

THE COURT: Mr. Clark, do I understand that you will
be trial counsel on this case? Is that correct, sir?

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1 MR. CLARK: Yes, your Honor.

2 THE COURT: Okay. Will you be doing this solo, sir,
3 or with assistance from your firm?

4 MR. CLARK: I believe so, your Honor. We actually
5 have a fairly recent associate who's just joined the firm
6 yesterday, and I think that we were potentially contemplating
7 having her, Ms. Marisol Santos, work as a second chair.

8 THE COURT: Off the record, please.

9 (Discussion off the record)

10 THE COURT: I see. Now normally I put up my fight and
11 I'd indicate that I have a rule of practice against such a
12 thing and that you have to be here from the beginning, but
13 since the folks at the back table keep multiplying
14 exponentially, I don't think it's fair to limit you to just one
15 of you. So if Ms. Santos is on board, I think that's fine.

16 Sir, while you're standing, I have a few questions
17 about your views on things. I will then talk to the folks at
18 the back table about some housekeeping matters, and then I will
19 hear from you on the motion *in limine*.

20 The parties have indicated to me that this is a
21 three-day trial. Can I hope that that's a really overly
22 thoughtful outlook? I mean, it's not going to take three full
23 days of testimony. Do we really have three full days of
24 testimony, sir?

25 MR. CLARK: Your Honor, in my experience, I think that

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1 that could potentially be overestimating it, but certainly the
2 length of cross examinations both ways does determine how long
3 these things go. I think two days, we could potentially get it
4 done, but I think three is the parties being fairly safe.

5 THE COURT: Okay. And your pretrial order suggests
6 the possibility of witnesses to authenticate documents. I
7 understood from the exhibit lists that there weren't disputes
8 about the authenticity or the authentication of the documents,
9 simply about perhaps their relevance or admissibility at the
10 trial. Is that correct?

11 MR. CLARK: I agree, your Honor.

12 THE COURT: So given that, at this juncture do you
13 contemplate that you'll have witnesses who are called only for
14 the purpose of authenticating things?

15 MR. CLARK: I don't believe so, your Honor.

16 THE COURT: And I suppose I can't ask you about
17 rebuttal witnesses because you'll have to see what comes in.

18 In your list of exhibits, there is a collection of
19 Seamless receipts, sir, on the order of about 2100 pages. I'd
20 like to have all of your exhibits -- and this goes for the
21 folks at the back table too -- by next Tuesday, one week from
22 today, so that I can look at them in advance of trial. But
23 should I be reading 2100 pages of receipts or is there
24 something in particular that I should be focused on?

25 MR. CLARK: Yes, your Honor. Part of the reason for

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1 my delay is I culled the 2100 pages of exhibits and brought
2 them with me, so I have those here today for your Honor.

3 Really what we think that this speaks to is partially the tip
4 deduction claim, which does include Seamless web deductions.

5 We think that this would be relevant for that. Certainly we
6 could, depending on how liability is determined in the course

7 of the trial, craft a spreadsheet based on the Seamless web
8 information, in order to come up with an estimate of the

9 damages for the tip deduction claim. And really that's the

10 purpose of admitting all of that, because we think that all of
11 those Seamless web reports, which include information

12 concerning gratuities, could conceivably be relevant for that
13 tip deduction claim. I don't think that your Honor needs to

14 give any special attention to all 2100 pages of the documents,
15 and certainly if it's found in the course of trial that there

16 is liability concerning tip deductions, then I think plaintiffs
17 would be very happy to craft some sort of helpful exhibit in

18 order to come up with a damages calculation for that claim in
19 particular.

20 THE COURT: Okay. Now, sir, I don't believe I've seen
21 any of these records, and I'm not asking to see them now, but
22 do they indicate in particular which plaintiff was affected by
23 which order?

24 MR. CLARK: I believe that they do, depending, but I'd
25 need to look at them closely. They vary a little bit in terms

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1 of their content.

2 THE COURT: Okay. And sir, I suppose I'll live until
3 the time you show up on the 17th. I don't have anything else
4 from a housekeeping perspective. Are there things that you
5 want to raise to my attention other than the *in limine* motion,
6 which I'll address separately?

7 MR. CLARK: Nothing really from plaintiff's
8 perspective.

9 THE COURT: If Ms. Santos is on board, she ought to
10 let me know sooner rather than later.

11 MR. CLARK: Yes. I'll instruct her to file a notice
12 of appearance as soon as possible.

13 THE COURT: Thank you very much.

14 Who is taking the oar for the back table? Mr. Giblin,
15 is it you today, sir?

16 MR. GIBLIN: It would be me, your Honor.

17 THE COURT: Okay. Thank you, sir.

18 The same questions to you in part. Will there be
19 authentication witnesses?

20 MR. GIBLIN: There may be one authentication witness.
21 I have not yet had enough time to discuss it with counsel, but
22 as your Honor knows, we did include a summary exhibit, sort of
23 similar in concept to what he wants to do with the Seamless
24 receipts, probably the construction of a spreadsheet
25 summarizing the various schedules and wage payout information

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1 that we have, so we may choose to call someone from our firm
2 who can walk your Honor through the methodology by which that's
3 put together.

4 THE COURT: Okay. And, sir, in that regard, I should
5 ask you this: When I dealt with Ms. Koo earlier in the case,
6 when she was proceeding pro se, I had a sense that there
7 weren't a complete set of payroll records, but I don't know,
8 because I did not actually see what was produced. Were you
9 able to locate a complete set of payroll records as to these
10 two individuals?

11 MR. GIBLIN: Your Honor, I would not rely on the word
12 "complete."

13 THE COURT: Okay. Perhaps I should say three, right?
14 Mr. Gamero, Mr. Mastranzo, and Mr. Sanchez?

15 MR. GIBLIN: Yes. We believe we have enough to
16 construct at least a reasonable inference of what plaintiffs
17 were paid over the course of that time period. Certainly I
18 would not describe it as definitive. But we would appreciate
19 the opportunity to make that case at trial.

20 THE COURT: Okay. Because I'm remembering far back
21 from another FLSA case that I had where I thought there was
22 something akin to a presumption that if there is a deficiency
23 in the records, it is, as it were, on you, on the employer to
24 indicate or to demonstrate that payment was made in accordance
25 with these statutes. Is that correct?

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1 MR. GIBLIN: That is correct, your Honor.

2 THE COURT: Okay. And your belief, sir, is that by
3 the records that you do have, you will be able to make that
4 showing.

5 MR. GIBLIN: We will, in good faith --

6 THE COURT: You will endeavor to make that showing.

7 MR. GIBLIN: We will endeavor to make that showing
8 based on the evidence that we have in our possession, that's
9 right, your Honor.

10 THE COURT: Okay, sir. I believe I have from you
11 electronic versions of the exhibits, is that correct? They've
12 all been sent to me electronically?

13 MR. GIBLIN: Yes, except for the seven exhibits on
14 which the summary exhibit will be based, and I'm willing to
15 discuss with the Court how best to approach that exactly.

16 THE COURT: What I'm wondering is, could I have all
17 the exhibits you think I should have by a week from today?

18 MR. GIBLIN: I believe that's possible, yes.

19 You will have them by next Tuesday, your Honor.

20 THE COURT: That is a better answer. But that is
21 fine. Okay. Thank you very much. Because I would prefer an
22 opportunity, before any of you walk into court, to have read
23 everything and to have a sense of what's going on.

24 In that vein, are there deposition transcripts?

25 MR. GIBLIN: Yes, there are. Two depositions were

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1 taken, one of Ms. Koo and one of Mr. Sanchez, one of the
2 plaintiffs.

3 THE COURT: Okay. Would someone be able to email
4 those to my chambers' email account so I can read them in
5 advance of the trial? I use that not to poison the well or
6 anything along those lines but because it aids me in
7 understanding if someone is going to later claim that there is
8 testimony inconsistent with their prior testimony, so if I get
9 to look at that, that would be useful. Since you're standing,
10 if I could ask you to send it to me, and if there are any
11 problems, please work it out with Mr. Clark and one of you send
12 it to me.

13 MR. GIBLIN: I would be happy to do so, your Honor.
14 An electronic version is fine?

15 THE COURT: That is fine, yes, exactly.

16 Is there anything else you want me to know, sir? And
17 while we're talking about the three days, is the three days
18 realistic?

19 MR. GIBLIN: Yes, your Honor, I think it's realistic.
20 As you know, we have five witnesses called. I think only one
21 will be lengthy. And there is one consideration I'd like the
22 Court to know, which is that one of our witnesses, who I
23 believe is listed as Ruyi Wu -- Ruyi Wang, but her name is
24 actually Ruyi Wu --

25 THE COURT: Yes. That was the issue that plagued you

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1 earlier, yes.

2 MR. GIBLIN: Yes, that's right.

3 She cannot testify on Tuesdays. She is unfortunately
4 ill and receives treatment on Tuesdays. So we would like to
5 reserve her for Wednesday morning, if the Court will allow us.

6 THE COURT: And she's not available Monday?

7 MR. GIBLIN: She is available Monday, but I am acting
8 on the assumption that plaintiff's case will at least take the
9 afternoon.

10 THE COURT: I see. Although --

11 MR. GIBLIN: I can have her available on Monday,
12 though.

13 THE COURT: Let me back you up one moment, sir. If
14 you'll excuse my grandmother's expression, let's burn that
15 bridge when we get to it, because I believe Ms. Wu is the
16 subject of the *in limine* motion. She's not?

17 MR. GIBLIN: No.

18 THE COURT: She's okay.

19 So then, Mr. Clark, do you have a view?

20 MR. CLARK: Your Honor, I'm happy to take her out of
21 order and take her on Monday in the afternoon, if that works
22 out, if defense counsel is okay with that.

23 THE COURT: Sir, does that work for her and you?

24 MR. GIBLIN: Subject to actually confirming with her,
25 yes, I believe it does, your Honor.

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1 THE COURT: Could you please.

2 MR. GIBLIN: I will.

3 THE COURT: And yes, if need be, if she has medical
4 issues, I will let her come in on Wednesday, but if there's a
5 possibility of evidence closing on Tuesday, it would be also
6 fine to have her testimony in before then.

7 Okay. Anything else, sir?

8 MR. GIBLIN: No, your Honor.

9 THE COURT: Okay.

10 All right. Mr. Clark, let me hear from you with
11 respect to your motion, please.

12 MR. CLARK: Yes, your Honor.

13 THE COURT: And let's just set the table here for a
14 moment. Other than Ms. Koo and me, no one else was here when
15 this case began, so I am sympathetic to both sides and the fact
16 that there have been changes in personnel. Similarly, I'm not
17 sure how receptive I am to the notion that someone was delaying
18 or someone could have done something earlier because -- and
19 this is directed as much to the folks at the back table as it
20 is to you -- when Ms. Koo first came before me, I think there
21 were rather significant efforts made to explain to her the
22 discovery process and to get from her the information that we
23 believed was relevant. So perhaps I may have misapprehended
24 what the relevant information was, but there certainly was an
25 attempt. Let me understand what happened, how it is you came

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1 to learn of these folks' existence, and why it is right now
2 that it would be prejudicial for you to have them testify at
3 this trial.

4 MR. CLARK: Yes, your Honor.

5 Certainly, as you know, I have not been following this
6 case entirely. Ms. Raquel Gutierrez is now currently at Fox
7 Rothschild, so she's yet another attorney jumping across the
8 lines, as it were.

9 THE COURT: Yes. Off the record again.

10 (Discussion off the record)

11 MR. CLARK: So I came onto this case closer to the
12 period where we were preparing the joint pretrial order.
13 Certainly in the course of discovery, this second period of
14 discovery that occurred following Ms. Koo obtaining defense
15 counsel, paper discovery was exchanged, a deposition was had.
16 In the course of that period we did serve interrogatories,
17 trying to understand the full universe of relevant witnesses in
18 the case. Some of the individuals who are listed in the joint
19 pretrial order were identified in response to these
20 interrogatory requests, and our motion doesn't speak to them.
21 However, there were these two individuals, Yazhong -- and I
22 apologize, my pronunciation is probably terrible -- Yazhong
23 Zhang and Quirong Lin. These two individuals were never
24 identified in response to interrogatory requests, so they were
25 not identified in initial disclosures and there was no attempt

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1 to amend the initial disclosures prior to the close of
2 discovery to include these two individuals.

3 THE COURT: I'm going to ask you to slow down just a
4 bit, sir, because I'm also reading notes as I'm talking to you.

5 Go ahead, please.

6 MR. CLARK: In the process of putting together the
7 joint pretrial order, it did come to my attention that when I
8 raised it as a potential issue in the drafting of the joint
9 pretrial order, I asked whether or not there were going to be
10 any witnesses who had not been previously disclosed in the
11 discovery process, the defendants indicated that they did not
12 consider themselves bound by the initial disclosures in
13 formulating their witness list. I said to that extent, to the
14 extent that there are individuals who were not raised in
15 discovery, I would be seeking exclusion, under the plain
16 language of Rule 26.

17 Then, as we were exchanging drafts of the joint
18 pretrial order, I did receive one that included the names of
19 these witnesses. That was my first introduction to these
20 witnesses being requested in the trial process. Certainly that
21 kind of notice I think is very problematic. The defendants,
22 even in their reply to my motion *in limine*, indicated that
23 these are witnesses that possess relevant and in fact essential
24 information for defendants' case, and yet they were never
25 mentioned in the discovery process, never mentioned in

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1 responses to interrogatories and the like. Certainly I do
2 think that there is an argument in defendant's reply that I
3 guess we shouldn't have truly believed their interrogatory
4 responses.

5 THE COURT: I'm sorry. Can I hear that again, please.

6 MR. CLARK: There was an argument that I think we were
7 insufficiently diligent in seeking out the names of witnesses.
8 Other than in an interrogatory asking for the name of all
9 relevant witnesses that could potentially be brought in at
10 trial, it is unclear to me what further diligence plaintiffs
11 could have really employed in order to discover these names.

12 THE COURT: I think a point of confusion for me, sir,
13 is that I understand from the defendants that there was a
14 Mr. Zhang and a Ms. Wu who were identified in depositions, and
15 so the individuals who are mentioned now in the pretrial order
16 are neither of these people? There is a Joe Zhang who is
17 mentioned in the interrogatory response, but that is a
18 different Zhang than Yazhong Zhang, who is sought to be a
19 witness in this case?

20 MR. CLARK: I believe that's different than the
21 interrogatory response, yes.

22 THE COURT: Okay.

23 MR. CLARK: If there is some sort of confusion there,
24 maybe there is a lingering confusion that the individual
25 identified -- if the individual is identified in the

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1 interrogatory, I don't have an issue with it, but my
2 understanding is that this is the first time we've ever
3 received this particular information concerning this particular
4 individual.

5 THE COURT: Okay. And, sir, what I'm understanding
6 you to say is that you first became aware of this in
7 discussions about the pretrial order?

8 MR. CLARK: Yes, your Honor.

9 THE COURT: Your adversaries have suggested a
10 telephone conference on or about the 16th of September of
11 this year. Do you think that might be the first time you were
12 made aware of this?

13 MR. CLARK: I think that that was around the time we
14 were discussing the contents of the joint pretrial order.

15 THE COURT: And there seemed to have been an exchange
16 of pretrial orders on the following Monday, September 19th.

17 MR. CLARK: I believe that timeline sounds right. I'd
18 need to check my calendar to confirm, but --

19 THE COURT: I'll try to question this way: Today is
20 the 4th of October. It's only been in the last three weeks
21 that you were made aware of these individuals?

22 MR. CLARK: Yes, absolutely.

23 THE COURT: And do you know what roles they played in
24 this case?

25 MR. CLARK: No, your Honor.

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1 THE COURT: Okay. All right. Please continue, sir.
2 Is there anything else you want to just make me aware of?

3 MR. CLARK: Oh, I don't believe so, your Honor. I
4 think that we could rest on the papers otherwise.

5 THE COURT: All right. I might come back to you on
6 reply.

7 All right. Is it Mr. Taffet? Yes?

8 MR. TAFFET: Yes. Your Honor, as an initial matter,
9 I'd like to point out what plaintiff's counsel has failed to
10 point out, which is there is no prejudice to plaintiffs in this
11 case as a result of this disclosure.

12 THE COURT: May I take issue with that, sir. Again, I
13 accept, first of all, that there are a number of you doing very
14 fine work for Ms. Koo and doing everything possible to give her
15 the best possible defense in this case. The issue for me, sir,
16 is the following: It's one thing for you to say, we came on
17 the case late, we've done everything we can, we've worked as
18 hard as we can, and we've come up with this information and
19 that is what happens when you're preparing for trial. What I
20 find less persuasive to me, although I'm not going to say it's
21 ultimately defeating, is the suggestion that somehow
22 plaintiff's counsel is to blame. Again, sir, I know you
23 weren't involved in this. I am telling you, Ms. Gutierrez and
24 I sat with Ms. Koo, and we were solicitous to the point of
25 indulgence early on in this case. So I take issue on

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1 Ms. Gutierrez's behalf that in some way she should have done
2 more here. So I will listen to you about what they knew and
3 when they should have known it, but in terms of saying they
4 should have been more diligent, that is an argument that will
5 not resonate with me.

6 MR. TAFFET: We understand, your Honor, and we
7 appreciate that effort, and we did not mean to suggest
8 otherwise. To the extent, however, that plaintiff's counsel
9 suggested that plaintiffs could have deposed these individuals,
10 the notion that they would have or may have deposed them in the
11 initial discovery period we think is not the case, considering
12 they didn't conduct any depositions during that period.

13 THE COURT: But again, sir, it is not my role to play
14 the part of Ms. Gutierrez in these proceedings. What I'm
15 telling you is, the way in which discovery was conducted at the
16 beginning was in deference to Ms. Koo's pro se status and the
17 fact that she had an ongoing business to run. So yes, they
18 could have conducted depositions, but I'm not at the moment
19 willing to say that that was some dereliction of their duty.
20 Maybe ultimately I'll decide it, but I don't think that's your
21 strongest argument.

22 MR. TAFFET: Okay. Well, I understand that, your
23 Honor, and we understand that Ms. Koo was given the opportunity
24 and did all she could and showed up at the plaintiff's
25 counsel's offices and tried to respond as best she could, and

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1 we think she made every good-faith effort she could to provide
2 answers to the questions that were posed to her. And since our
3 coming on the case and having discovery reopened, the Court
4 granted a single deposition to plaintiffs, a single deposition
5 of Ms. Koo, not of anyone else, in an effort to mitigate any
6 potential prejudice to plaintiffs as a result of reopening
7 discovery for defendants on the limited basis. So from that
8 point forward it's clear that if these witnesses had been
9 identified, no deposition could have been conducted. And --

10 THE COURT: No, no, no, no, no. Again, I'll take
11 issue with you. Why couldn't someone have written to me and
12 said, why couldn't Mr. Clark have written to me and said: We
13 are just now being made aware of something; in contravention of
14 the interrogatory responses that we received, there are
15 actually other people?

16 MR. TAFFET: He could have done that, your Honor. We
17 don't expect that would happen because plaintiff's counsel did
18 oppose reopening discovery in the first place. And when
19 discovery was reopened, we worked diligently to investigate, to
20 the extent we could up until that point, to find out the names
21 of relevant individuals who might have relevant information to
22 the case, and we did identify two individuals. I believe in
23 the interrogatory responses it was Ruyi Wu and Joe --

24 THE COURT: Zhang?

25 MR. TAFFET: -- Zhang.

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1 THE COURT: And neither of those are the proposed
2 trial witnesses?

3 MR. TAFFET: That's correct. But notably, your Honor,
4 counsel doesn't take issue with the fact that those two
5 witnesses are going to be called at trial. And no deposition
6 was sought of those two witnesses. So the notion that if we
7 had listed two additional names in our interrogatory responses,
8 counsel would have chosen to write to the Court to reopen
9 discovery for further witnesses, not just for the limited
10 purposes for which it had been opened in the court order, is a
11 questionable proposition on the issue of prejudice, your Honor.

12 THE COURT: Why is it that the two individuals who are
13 the subject of this *in limine* motion were identified so late?
14 Are they current employees, sir?

15 MR. TAFFET: Your Honor, they are current employees of
16 the restaurant. We acknowledge that we perhaps could have
17 initially created an extensive list of all employees at the
18 restaurant, but we didn't expect that every single employee of
19 the restaurant would have information relevant to this case and
20 didn't think that would be useful. It so happened in the
21 deposition of Ms. Koo, as noted in our papers, that these two
22 individuals -- in response to a question by plaintiff's
23 counsel, Ms. Gutierrez, Ms. Koo provided the names of these two
24 individuals, one of whom was not identified by the name that is
25 used in the joint pretrial order. But with that in mind, even

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1 once discovery was closed, which I believe was about two days
2 after those depositions, you'll recall, your Honor, we had to
3 submit papers to the Court to extend discovery maybe a week,
4 ten days. I'm not sure what it was. But to accommodate
5 schedules for depositions was the reason for that. And the
6 discovery deadline ended up being only a few days after the
7 depositions, so once we had a chance to get the rough
8 transcripts of the depositions, we were able to look at them
9 and review that with Ms. Koo and identify who these individuals
10 were and go back to her and discuss with her who they were, and
11 only then were we able to find the time to go down to her
12 establishment, her place of business, to discuss with them what
13 they might know. And at that point we were coming up -- well,
14 at that point we were coming up on the deadline for the
15 pretrial order. And as plaintiff's counsel has acknowledged,
16 several days before the pretrial order was due, we had
17 discussions with him about the witness list that would be
18 included. We notified counsel that there were a few witnesses
19 who we would like to include, who had not been previously
20 identified. He did notify us of his plans to possibly move to
21 exclude those witnesses at that time. We were prepared to
22 exchange drafts on that day, actually, but it was suggested
23 that we exchange the following Monday, so that was fine with
24 us. And at that point, about a month before trial, in
25 accordance with the deadline for the joint pretrial order,

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1 these names were identified in draft.

2 We don't think this is a case where surprise witnesses
3 have been disclosed on the eve of trial. We think that the
4 plaintiffs are in the same position as they were before. The
5 time period between the interrogatories and the joint pretrial
6 order, it doesn't seem the plaintiff's position has changed.
7 They didn't have the opportunity to depose these two
8 individuals at the time of the interrogatories, and there's no
9 change in that now.

10 THE COURT: I'd like to back up a little bit, sir.

11 MR. TAFFET: Yes.

12 THE COURT: I do not believe that I have seen formal
13 interrogatories in this case, although I was involved in some
14 capacity as an intermediary between Ms. Gutierrez and Ms. Koo
15 in communicating on interrogatories. Is there an interrogatory
16 to which these two witnesses' names would have been responsive?

17 MR. TAFFET: As it stands today, yes, your Honor, to
18 our knowledge, our knowledge as it exists today, we would have
19 included these two individuals' names in the interrogatory
20 responses.

21 THE COURT: Okay. And similarly, sir, had you been
22 involved at the time of the Rule 26 disclosures, such as they
23 were, would you have disclosed the identity of these two
24 individuals?

25 MR. TAFFET: To the extent our investigation had

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1 reached that point, your Honor, we would have been able to
2 disclose them. I don't know at what stage we would have been
3 at that point. For example, when we responded to the
4 interrogatories, that was when we were beginning to represent
5 Ms. Koo and her restaurant in this matter, and we had not
6 reached that point in our investigation and thus were not able
7 to disclose the names of these individuals.

8 THE COURT: Okay. And I mean not to beat the dead
9 horse here. I just want to understand it better. How did the
10 lightbulb suddenly go on at the deposition that had not been on
11 for the entirety of this litigation? It would be in the
12 category of not crazy to think that employees who served
13 concurrently with the plaintiffs might have some knowledge
14 about the case. So why were they not disclosed to them
15 earlier?

16 MR. TAFFET: Your Honor, I don't take issue with that
17 proposition.

18 THE COURT: Okay.

19 MR. TAFFET: But as we worked quickly and we worked to
20 develop --

21 THE COURT: No, no. I'll ask the question again.

22 MR. TAFFET: Sorry.

23 THE COURT: Without disclosing privileged
24 communications, do you have some sense as to why Ms. Koo, while
25 representing herself pro se, did not think that it was

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1 necessary to disclose these individuals' names?

2 MR. TAFFET: Your Honor, I don't have that information
3 offhand. I don't want to --

4 THE COURT: I don't want you to lie, sir, so that's
5 okay.

6 MR. TAFFET: -- testify to knowledge, but I do think
7 that -- and we appreciate the Court's full efforts to explain
8 Ms. Koo's discovery obligations to her. I think, as we
9 understand it, in her interactions with Ms. Gutierrez, she, in
10 good faith, was extremely amenable to plaintiff's counsel. She
11 showed up at their office; she brought these documents with her
12 that she was asked to bring. While we understand that,
13 proceeding pro se, it was incumbent upon her to make efforts to
14 understand her obligations, we don't believe that she fully
15 comprehended what it meant to even put forth her case to go to
16 trial, let alone what was relevant to trial and who might have
17 relevant information. I mean, there are --

18 THE COURT: No, no. I won't make you speculate, sir.

19 MR. TAFFET: Okay.

20 THE COURT: Let me ask you something. I want to
21 return to something you and I spoke about a few moments ago.

22 Oh, is there something you want to communicate to me,
23 sir?

24 MR. CLARK: Not here.

25 THE COURT: No, no. There's a note that's being

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1 passed.

2 MR. TAFFET: That's okay, your Honor.

3 THE COURT: Okay. Sir, earlier you and I spoke and I
4 indicated to you that I wasn't as receptive as you wanted me to
5 be to the notion that no depositions were taken and therefore
6 no depositions would have been taken, but I appreciate, as
7 we've been talking, what I think you are making as a refinement
8 on that argument, which is, looking at the period of Ms. Koo's
9 representation by your law firm, I should derive some
10 significance from the fact that even though there were
11 witnesses identified in July, there were no efforts made to
12 depose those witnesses. So while I have been focused on the
13 early phase of the case, I think what you were trying to
14 redirect me to, and I want to make sure that therefore, I am
15 not misconstruing your argument, is that I should look at and
16 derive some significance from the fact that in July, when two
17 other names were floated, there was not suddenly a rush to come
18 to me seeking permission to take depositions, nor was there a
19 request to take their depositions. And so what you're saying
20 is, given that, I should understand that these September
21 disclosures, had they been made in July, would have been met
22 with similar crickets, as it were.

23 MR. TAFFET: I think that's right, your Honor. And
24 the only thing I would add to that is that when the opportunity
25 to depose even Ms. Koo was presented by our motion to reopen

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1 discovery, it was opposed.

2 THE COURT: Well, yes, but again, I understand why it
3 was.

4 MR. TAFFET: All right.

5 THE COURT: I mean, the point was -- and I don't mean
6 to speak for plaintiff's counsel, but here I am again speaking
7 for plaintiff's counsel. I think the belief was, they were
8 fine with Ms. Koo getting representation, but they had
9 proceeded in a particular way with a particular course of
10 action and did not appreciate being upended by your joining the
11 case. So I understand both sides' positions on that.

12 Let me take a moment, please, to talk to Mr. Clark,
13 unless there's any argument you have not made to me that you
14 wish to, sir, because I don't want to leave you wishing you had
15 said something.

16 MR. TAFFET: I believe that's all, your Honor.

17 THE COURT: Thank you very much.

18 Mr. Clark, can I hear from you on the issue of
19 prejudice, sir. And I think you heard the discussion I was
20 having most recently with Mr. Taffet, and that is that they're
21 asking me to discern a lack of prejudice from the fact that
22 when names were floated in July, you or your predecessor did
23 not immediately run to court asking to depose these
24 individuals. So could you talk to me about that, please.

25 MR. CLARK: Yes, your Honor.

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1 As to prejudice, I think it's fairly clear that there
2 would be prejudice in this case. Certainly defendants'
3 response to the motion *in limine* indicated that these witnesses
4 are essential to their case, that these witnesses contain
5 relevant information. It's hard to imagine an instance of
6 ambush before trial any more than giving over names of
7 witnesses with essential information the day the joint pretrial
8 order was due. And certainly if my clients go to trial with
9 two witnesses who have been represented to contain essential
10 information concerning this case, I think it's clear that there
11 would be prejudice.

12 As to the second point, concerning the fact that
13 additional depositions weren't done, I do think that there is
14 one sort of sideview by defendants, which was that the only
15 individual that we could depose under your Honor's order was
16 Ms. Koo. It's hard for me to think exactly what prior
17 plaintiff's counsel were thinking about this.

18 THE COURT: Okay.

19 MR. CLARK: My understanding would be, I question very
20 seriously whether or not we could have deposed the other
21 individual, given the fact that I think part of why only one
22 witness was allowed to be deposed on defendant's part was to
23 limit the prejudice concerning the late reopening of discovery
24 after significant discovery had occurred. I think if it had
25 been clear that we had these additional names, first, we would

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1 have very seriously weighed, given the represented information
2 that they had, deposing them, and writing to the Court
3 concerning that information; and then second, there was a
4 deposition of Ms. Koo in which there was no real ability to
5 depose Ms. Koo substantively on who these essential witnesses
6 were and are and what information that they have. Given the
7 fact that we were completely blind as to these individuals and
8 that our ability to functionally investigate the information
9 those individuals have is crippled in the discovery process, I
10 think that there are many ways that prejudice could be
11 inferred.

12 THE COURT: All right. And sir, I don't want you to
13 establish too much importance to the hypothetical I'm about to
14 ask you, because it is just that.

15 MR. CLARK: Okay.

16 THE COURT: If you were given access to these
17 individuals in the two weeks prior to trial, would you depose
18 them?

19 MR. CLARK: In the next two weeks?

20 THE COURT: Yes, sir.

21 MR. CLARK: Yes, I would.

22 THE COURT: Okay. All right. What else do you want
23 me to know about prejudice, sir, or anything else in response
24 to what I've been discussing with Mr. Taffet?

25 MR. CLARK: I believe I've said my piece as to it,

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1 your Honor.

2 THE COURT: Okay. Thank you very much.

3 Mr. Taffet, would these individuals be available for
4 deposition in the next two weeks?

5 MR. TAFFET: Your Honor, while we stand by all of the
6 arguments we've made today, if your Honor is receptive to
7 potential accommodation, we would be happy to make them
8 available for deposition.

9 THE COURT: I will tell you that my initial feeling,
10 when I came out on the bench, was that I was going to allow one
11 and not both and let you choose. But that sounds too much like
12 baby splitting to me, and I don't think it's fair to either
13 side, actually. So the hypothetical will become real. Make
14 them available for depositions in the next week or so, sometime
15 prior to trial, so that plaintiff's counsel is not unaware of
16 what they're going to say. You'll find some time to make them
17 available, and if there are problems, someone will let me know,
18 because you know how to do that. But I think that is the
19 fairest resolution of the matter. It has been just represented
20 to me that had they known, they would have deposed them. I
21 accept what you've told me about the discovery of this
22 information, and I accept what he tells me about the need for
23 this information, and that is the way I will resolve it. If it
24 turns out you're only able to make one available for
25 deposition, that will be the one who testifies at trial. All

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1 right?

2 MR. TAFFET: Yes, your Honor.

3 THE COURT: All right. While you're standing, sir, is
4 there anything else you want to bring to my attention?

5 MR. TAFFET: No, your Honor.

6 THE COURT: Okay. Let me talk for a moment, please,
7 to -- ah, I've got a blank on your name. You know I can't
8 pronounce it, so would you pronounce it for me, sir.

9 MR. TAKOUGANG: Takougang.

10 THE COURT: Yes, thank you. Are you going to be
11 admitted by the time of this trial, sir?

12 MR. TAKOUGANG: I think I've been admitted *pro hac*.

13 THE COURT: I know. That's what I was asking. I'll
14 let you go *pro hac*, but I believe we had another conference
15 where you talked about getting admitted all the way.

16 MR. TAKOUGANG: Yes. I just took the bar in January
17 and so --

18 THE COURT: I see. Thank you for bringing that to my
19 attention.

20 All right. Mr. Clark, is there anything you want to
21 bring to my attention?

22 MR. CLARK: No, your Honor. We will be getting a
23 Spanish translator for plaintiffs for their testimony.
24 Certainly we know how it all works, getting someone certified
25 and the like.

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1 THE COURT: Yes. Thank you.

2 Yes, Mr. Taffet?

3 MR. TAFFET: As reflected in the joint pretrial order,
4 we'll also need a Mandarin translator for some of the
5 defendants.

6 THE COURT: Yes. I guess that is going to contribute
7 too to the length of the trial, because there will be a little
8 extra time for the translation. That's fine. As long as it
9 gets done. And I was saying to my law clerk, the trial is a
10 little bit preclimactic and not anticlimactic because I'm
11 interested in the findings of fact and the conclusions of law
12 that you each prepose to me as a result of which we're here for
13 this trial.

14 Let me thank all of you for coming this afternoon.
15 Again, other than Ms. Koo and myself, you guys are all new to
16 this case. We're happy to have you on board. I certainly am.

17 You will, I expect, discuss with each other a schedule
18 for these two depositions and you will tell me if there are any
19 problems.

20 Mr. Taffet, since you're standing, can I impose upon
21 you, please, sir, the responsibility for obtaining a transcript
22 of this conference.

23 MR. TAFFET: Yes.

24 THE COURT: All right. Thank you all for coming in.

25 MR. CLARK: Thank you, your Honor. (Adjourned)